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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 130

WILLIA NIUKKANEN, also known as WILLIAM NIUKKANEN, also known as WILLIAM ALBERT MACKIE,

Petitioner,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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1 Wharton, "Criminal Procedure" (10th Ed.):

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The American Committee for Protection of Foreign Born moves for leave to file a brief as *amicus curiae*. This application is made as petitioner's brief is essentially confined to a constitutional question and does not cover the antecedent and threshold question of statutory construction.

The statute 8 U. S. C. 1252(b)(4) provides: "* * * no decision on deportability shall be valid unless it is based on reasonable, substantial, and probative evidence."

Respondent has construed this to authorize deportation on a mere preponderance of proof not only in cases of illegal entrants but of petitioner, who has a lawful resident status of 50 years standing.

Counsel believes that "reasonable, substantial, and probative" as applied to expulsion proceedings against lawful permanent residents means "clear, convincing, and unequivocal." This construction would conform to Congressional intent and not subject the statute to constitutional infirmity as denying due process of law.

This question of statutory interpretation is presented in cases now pending with the Immigration and Naturalization Service (such as William Lahtinen, A-4236313; Leonard Costa, A-4823954) and is important to the general conduct of deportation proceedings against resident aliens.

The American Committee for Protection of Foreign Born is a national organization in existence for the past 26 years. The Committee concerns itself with education, legislation, and analysis of basic legal issues arising from enforcement of the Immigration and Nationality Act. The Committee endeavors to contribute to the full acceptance of the foreign born in American life on a plane of respect for their rights and recognition of their cultural, industrial, scientific, and other contributions. In furtherance of this program the Committee accordingly moves, in view of the general importance of the issues in the present case, for leave to file the following brief as *amicus curiae*.[1]

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[1] The written consent of petitioner to the filing of this *amicus* brief has been obtained. The consent of respondent has been denied by letter, a copy of which *amicus curiae* is filing with this brief.

BRIEF OF *AMICUS CURIAE*

Preliminary Statement of the Case

Petitioner has been a lawful permanent resident since his entry in 1909 at the age of ten months. He served honorably in World War II and is the head of a family.

Respondent commenced deportation proceedings, charging petitioner with membership in the Communist Party from 1937 to 1939. Petitioner categorically denied the charge. Two witnesses testified in support of the charge. No documentary corroboration was presented. Respondent held that a mere preponderance of proof sufficed and sustained the charge.

POINT I

The statutory scheme shows Congressional intent that deportation of permanent resident aliens be based on "clear, convincing, and unequivocal evidence" and not a mere preponderance of evidence.

The Immigration and Nationality Act (8 U. S. C. 1101 *et seq.*) explicitly recognizes two classes of aliens, delimited under "Title II—Immigration" and "Title III—Nationality and Naturalization." The first comprises those seeking admission who can be excluded, as well as illegal entrants, and those overstaying temporary admission who can be expelled. None of these possess lawful permanent residence. The second class consists of aliens who are lawful permanent residents. These possess, in addition to residence, the right on certain conditions to naturalization. Such aliens relying on the security of their status have families and acquire property. The statutory scheme shows

on its face that Congress made a basic distinction in the substantive rights of resident and non-resident aliens.

As regards deportation proceedings, Congress specified that the decision be based on "reasonable, substantial, and probative evidence." "Reasonable" is a relative term. A first and fundamental aspect of a reasonable procedure is that it have a reasonable relationship to the substantive end. "Reasonable" here implies rational, just, and appropriate, considering the basic statutory classification of non-residents and residents (Title II and Title III of the Act). Procedure is a means to effectuate the substantive end, and rationally corresponds to the different rights involved.[3] The words "reasonable, substantial, and proba-

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[2] *Broad & Branford Place Corp. v. F. J. Hoskenjos Co.*, 132 N. J. L. 229, 232, 39 A. 2d 80, 82; *Le Cuno Oil Co. v. Smith*, Tex. C. A., 306 S. W. 2d 190, 195.

[3] In *Bonnett v. Vallier*, 136 Wis. 193, 203 204, 116 N. W. 885, 888, 7 L.R.A., N.S. 480 the Court wrote:

> "It is said that an attempt to give a specific meaning to the word 'reasonable' is 'trying to count what is not number, and measure what is not space.' Altschuler v. Coburn, 38 Neb. 881, 890, 57 N. W. 836, 838. It is not synonymous with 'expedient.' Matters of that sort are wholly for legislative cognizance. As applied to means to a legitimate end it suggests not necessarily the best or the only method, but one fairly appropriate at least under all the circumstances. In the ultimate, the scope of the term as regards any situation must be measured having regard to the fundamental principles of human liberty, as they were understood at the time of the formation of the Constitution and were intended to be impregnably entrenched thereby, adapting the same, of course, to our modern conditions * * *. It 'reasonable' is what 'from the calm sea level' so to speak, of common sense, applied to the whole situation, is not illegitimate in view of the end to be attained. In determining that, the court must look to the language of the statute and to all the facts bearing on the situation of which it may properly be said to judicially know because of their common nature or otherwise."

tive" do not exist in a vacuum, divorced from their context. The statutory procedure must be construed to conform with the substantive purpose of the Act, which differentiates between the rights of residents and all other aliens.

This statutory distinction comports with the great difference in the factual issues presented between deportation cases of residents and illegal entrants. In cases of residents, the factual and legal issues are frequently complex, go far back in the past, involve loss of a long possessed lawful status, and of long-established family and property ties.[1] In cases of illegal entrants the issues are commonly simpler, relate to recent events, and do not involve loss of a lawful status or long-established family and property ties.

The gloss given the statute by respondent has ignored these fundamental statutory and factual distinctions. Respondent has held that all aliens, both resident and non-resident, can be deported on a mere preponderance of evidence. This obliterates at a critical point the different substantive and procedural scheme provided by Congress for two classes of aliens. The lawful resident here for a lifetime is, as regards the procedure governing the retention of his status, reduced to the plane of an illegal entrant here for a day. The resident's right to remain becomes subject to defeasance by the narrowest balancing of a mere preponderance of evidence. In view of the far more grave and difficult issues involved, a larger margin of safety against

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[1] Cf. *Kowoidt* v. *Perfetto*, 355 U. S. 115; *Galvan* v. *Press*, 347 U. S. 522, 531; *United States ex rel Eichenlaub* v. *Shaughnessy*, 338 U. S. 521; *Lehmann* v. *United States*, 353 U. S. 685.

Many cases against residents involve the stale testimony of unreliable informers.

error in the protection of the cherished right of lawful residence is "reasonable."[5]

Congress did not indicate that the standard—"reasonable, substantial, and probative"—dictates or sanctions a criterion of evidence (a mere preponderance) so inherently susceptible in resident cases to arbitrary results. On the contrary, the manifest structure of the Immigration and Nationality Act (Titles II and III) evinces Congressional intent to afford resident aliens a greater measure of procedural protection in the retention of their status.

By comparison, revocation of naturalization requires "clear, convincing, and unequivocal evidence." Loss of the right to reside here, banishment, can manifestly be even more serious than loss of citizenship. This Court has repeatedly noted the grave consequence of deportation of lawful residents. An equal standard of proof is warranted in both instances. Only in this way can the statutory standard be "Reasonable: Conformable or agreeable to reason: just; rational" Bouvier's Law Dictionary (Rawle's 3rd Revision).

The acquisition and loss of rights by resident aliens are *in pari materia*. Congress gives resident aliens an equal procedural measure of protection in the acquisition of further rights through naturalization, as in the retention of those they already possess through lawful residence.

The minutest examination of the statute does not disclose any language or purpose which specifically or by implication support respondent's contention that residents can be

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[5] In a deportation case of a longtime lawful resident the Court held that she "would seem entitled to have in her trial at least those safeguards given to an accused in a felony case if not those granted to an accused in a capital case." *Petroscz v. Holland*, D. C. [illegible], Pa., 1956, 142 F. Supp. 369, 373.

deported on a mere preponderance of evidence. It can be assumed *arguendo* that to "construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible means of the words used." *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10.

The construction that "reasonable, substantial, and probative" requires (in deportation proceedings against residents) "clear, convincing, and unequivocal evidence" will assure that "solidity of proof" (*Rowoldt* v. *Perfetto*, *supra*) requisite to such cases.

POINT II

Due process requires that an order of deportation banishing a permanent resident be supported by "clear, convincing, and unequivocal evidence."

The statute has prescribed that proof be "reasonable, substantial, and probative." But the application of that standard, its interpretation in a particular case, has not been explicitly stated by Congress. This is the responsibility of the courts who construe the language in accordance with the intent of Congress and in case of conflicting meanings avoid, if possible, a construction which would lead to denial of due process of law or other constitutional infirmity.

A resident alien cannot be deprived of liberty in a criminal case except by proof beyond a reasonable doubt. Statutes of limitation, in addition, establish limits such as five years in the State of New York for all crimes except murder and kidnapping (New York Code of Criminal Procedure,

Sec. 142). Yet the statutory construction maintained by respondent would permit, on the basis of a mere preponderance of evidence, the loss by petitioner of the very right to remain in the United States, and his banishment to a strange land he left as an infant, an extremely severe punishment. And this on the basis of testimony as to events extending back to 1937-1939.[6]

Important considerations of public policy have motivated the Federal Government and the States to enact statutes of limitation for various civil proceedings and all but the most serious crimes. The "very existence of the statute (of limitations) is a recognition of and notification by the Legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt." 1 Wharton, *Criminal Procedure* (10th Ed.) 415, Sec. 367.[7]

The resident alien who like all others is protected in his liberty by statutes of limitation has none as to proceedings to terminate his very right to remain in the United States. If the property and civil rights of a resident alien are fully entitled to equal protection of the laws and other constitutional safeguards, equally the foundation for these rights, his status as a permanent resident is entitled to the protection of a full and not a partial measure of due process of law. To sanction "loss of all that makes life worth living" (*Ng Fung Ho* v. *White*, 259 U. S. 276, 284) on a mere pre-

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[6] In a deportation proceeding against a resident, William Lahmen, A 4236313, pending in the New York City District, government witnesses testified as to events in 190[illegible].

[7] Such a statute serves to prevent mistakes, perjuries and fraud. *Riddlesbarger* v. *Hartford Fire Ins. Co.*, 74 U. S. 386, 390; *Bell* v. *Morrison*, 26 U. S. 351, 360; *Freman* v. *Sheaffer Pen Co.*, D. C. N. D. Iowa, 1953, 111 F. Supp. 39, 47, *People* v. *Ross*, 325 Ill. 417, 156 N. E. 303, 304.

ponderance of evidence and unreliable evidence extending into the remote past, cannot square with "essential standards of fairness" (*Bridges* v. *Wixon*, 326 U. S. 135, 154).

There is a fundamental constitutional difference between the status of a resident and of a non-resident. Exclusion of immigrants and expulsion of illegal entrants or overstayed non-immigrants (e.g. visitors, students, seamen) or those admitted because of an error made in inspection—all these may not pose constitutional problems. But expulsion of those lawfully admitted for permanent residence, for conduct after entry—in essence banishment—does raise constitutional issues. Deportation in such cases constitutes not merely ejection but loss also of a resident status and therefore banishment.[5] Protection of that status has equal and often greater importance than retention of naturalization. The foundation, lawful residence, is entitled to the same measure of procedural protection as the capstone, naturalization.

Certain deportation cases based on criminal convictions implicitly involve adherence to the standard of "clear, convincing, and unequivocal evidence." *Lehmann* v. *United States*, 353 U. S. 685; *Jordan* v. *De George*, 341 U. S. 223. The conviction, the ground on which deportation in such cases is predicated, is established by proof beyond a reasonable doubt. Not only in these cases but in all cases of deportation of residents clear, convincing, and unequivocal evidence should be required. It is anomalous to permit the

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[5] Exclusion of immigrants or their expulsion because of wrongful admission is qualitatively different from expulsion of properly admitted aliens because of post-admission conduct. The latter is more properly designated as banishment and its constitutional basis is questionable. Hesse, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel (two articles), 68 Yale L. J. 1578 and 69 Yale L. J. 262.

deportation of one who has committed no crime and whose conduct may have been little more than political unorthodoxy—at a time also when the statute did not make that conduct a ground for deportation—upon a bare preponderance of the evidence as determined by administrative officers, when in the case of those deported for criminal conduct, the conviction upon which the deportation is based must be established by evidence beyond any reasonable doubt and subject to all of the protections of due process in a judicial trial of a criminal case.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be reversed.

Respectfully submitted,

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